SUPREME COURT, U. S.
Supreme Court, U.
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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1843

JOSEPH ACANFORA, III,

Petitioner,

v.

BOARD OF EDUCATION OF MONTGOMERY COUNTY; MONTGOMERY COUNTY PUBLIC SCHOOLS; HOMER O. ELSEROAD, individually and as Superintendent of Schools; DONALD MIEDEMA, individually and as Deputy Superintendent of Schools; WILLIAM G. COLMAN, individually and as President of the Board of Education; JOHN AIRD, individually and as Vice President of the Board of Education; JAMES H. DAUGHERTY, ROSEMARY HILBERG, MARILYN ALLEN, THOMAS B. COOK and THOMAS ISREAL, individually and as Members of the Board of Education of Montgomery County,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT S. BOURBON
30 Courthouse Square
Suite 204
Rockville, Maryland 20850

Attorney for Respondents

WASHINGTON, D.C. • CUR PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that a writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case.

STATEMENT OF THE CASE

Respondents submit that the treatment by the United States District Court for the District of

Maryland and by the United States Court of Appeals for the Fourth Circuit of the facts in this case come much closer to the mark than does Petitioner's Petition for Writ of Certiorari herein.

REASONS FOR DENYING THE WRIT

ARGUMENT

I.

THE COURT CANNOT SANCTION LIES TO THE GOVERNMENT.

The crux of Petitioner's first argument is that "the lesson taught by the decision below is that homosexuals who are public employees, and who concealed their homosexuality when applying for that employment, have no protection against job loss should they now acknowledge their homosexuality." While this may be correct, it would be more accurate to state that the lesson to be learned below is that he who knowingly lies to the government will not be given shelter by the judiciary when he is caught: indeed, *that* is the teaching of *Dennis* and its companions. Petitioner entreats this Court to amend that doctrine to say, instead, that the courts will sanction governmental lies so long as the liar is a homosexual.

II.

THE *DENNIS* LINE IS APPLICABLE.

A. The instant case is not based on "pretext."

Petitioner repeatedly suggests that the discovery of the lies was seized upon by the Board of Education in this case as a mere pretext, or excuse, for the transfer

and non-renewal. Petitioner argued this same position extensively (in two post-argument briefs) to the Fourth Circuit, obviously without success. The holding of the Fourth Circuit is unequivocal and correct:

> His intentional withholding of facts . . . is inextricably linked to his attack on the constitutionality of the school system's [actions] . . . .
>
> 491 F.2d at 504.

Given that factual basis, the Court quite properly held that Petitioner's argument "is predicated on an unduly restrictive application of the principles expressed in *Dennis* and *Bryson.*" *Id.*, at 502.

> *See Rodriguez v. Seamans*, 463 F.2d 837 (D.C.Cir. 1972), *cert. dis.* 409 U.S. 1094 (1973), and *Williams v. United States*, 434 F.2d 1346, 1354 (Ct. Cl. 1970) (Nichols, J., concurring).

B. and C. *Dennis* is a threshhold question.

Petitioner's argument in these sections loses sight of the fact that Dennis is a threshhold question: once the lie to the government is revealed and it is established that it has a factual nexus with the transfer and discharge, Petitioner's constitutional claims cannot be reached by the courts. In the instant case the Fourth Circuit found it necessary to speak to Petitioner's constitutional claims by way of dicta because the District Court's decision in this regard was patently defective. Accordingly, the cases relied upon by Petitioner, which deal with situations wherein the state action is motivated by a mixture of constitutional and unconstitutional reasons, are inapposite.

D. Petitioner should have relied upon the judicial system.

(1) Petitioner asserts that his Homophyles' membership was not directly related to his fitness to teach, and he therefore legally omitted mention of it. He does not explain why he felt that "Swimming,

Bowling, Student Council, Magazine and Newspaper Staff, Honor Society, [and] NROTC" *were* directly related to his fitness to teach. This argument is both semantic and conjectural.

(2) Petitioner's claim here is that he could not trust the judicial system to vindicate unconstitutional action against him, and therefore he lied. Had Petitioner never experienced the judicial system in action, his argument might be more persuasive. However, the uncontroverted facts in this case indicate that Petitioner had twice, in as many attempts, been vindicated in similar actions in Pennsylvania: if anyone should have been aware of the capabilities of the judiciary to deal with injustice to homosexuals, it was Petitioner. It is hardly appropriate for him now to attempt to engage the Supreme Court in a game of conjecture and speculation regarding the adequacies, *vel non*, of modern pre-trial discovery had Petitioner in fact trusted our judicial system.

III.

THERE WAS NO VIOLATION OF PROCEDURAL DUE PROCESS.

Initially, it should be understood that Petitioner was given a full hearing on the decision not to renew his contract: his complaint is that he did not receive a hearing prior to his transfer from the classroom. Secondly, Petitioner filed an action in Federal Court seeking an injunction for what he felt was an unconstitutional action taken against him because he was a homosexual. That claim is strictly legal, and calls for none of the "expertise" associated with administrative boards. In *Skehan*, the court found that administrative expertise was needed to determine the limits of "academic freedom". Thus, this case is inapposite, while

Barker v. Hardway, 399 F.2d 638 (4th Cir. 1968) *cert. den.* 394 U.S. 905 (1969), is appropriate for adoption by the Supreme Court.

Further, Respondents contend:

1) That Petitioner did not have a cognizable "property" or "liberty" interest in classroom teaching under *Perry v. Sindermann*, 408 U.S. 593 (1972), or *Board of Regents v. Roth*, 408 U.S. 564 (1972).

2) That a temporary transfer pending investigation is permissible on its face, or, as here, accompanied by a statement of reasons to the Petitioner. *Roth, supra* at 569; *Springston v. King*, 340 F. Supp. 314 (W.D. Va. 1972); *Holliman v. Martin*, 330 F. Supp. 1 (W.D. Va. 1971).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

ROBERT S. BOURBON
30 Courthouse Square
Suite 204
Rockville, Maryland 20850
Attorney for Respondents